WP(C) 2114/2007
BEFORE
HON'BLE MR. JUSTICE RANJAN GOGOI

The writ petitioners, who have formed a joint venture in order to respond to a Notice Inviting Tender issued by the Assam State Electricity Board (for short 'ASEB), assails the decision of the respondent Board holding the technical bid submitted by the respondent No.5 to be responsive so as to justify the opening of the financial bid offered by the said respondent No.5. The writ petitioners and the respondent No.5, it must be noticed, are the only two bidders who had submitted their response to the NIT in question. It must also be noticed at this stage that the financial bid offered by the petitioners exceeds the amount quoted by the respondent No.5 by over Rs. 8 crores.

2. The detailed facts that will be required to be noticed for an effective adjudication of the issues arising from the voluminous pleadings of the parties, the records produced and the arguments advanced, may now be narrated.

3. The Assam State Electricity Board had published a NIT dated 12.3.2006 for International Competitive Bidding for procurement of Grid Communications (PLCC) Equipment for the sub stations in Assam under the Assam Power Stations Development Project. The cost of procurement of the equipment and the machinery for which the bids were invited were to be met from a loan from the Asian Development Bank (ADB). The Government of India, the State of Assam and the ADB were parties to various loan agreements which were executed to facilitate grant and receipt of loan from the ADB by the State of Assam which was to be made available to the ASEB for different works in connection with the Assam Power Stations Development Project. The various loan agreements which have been brought on record by the contesting parties would go to show that apart from the usual and pre-set norms that were to guide the proposed finance to be made available by the ADB, the outlay of the loan amount against specific contracts like the present one were required to be approved by the ADB at all stages. The details of the invitation to submit bids, the norms governing such invitation and consideration of the bids to be submitted make it clear that apart from the two bid process which was to be evaluated by a Committee of Technical Experts, whose opinion was to be submitted to the ADB for its final approval, the parties had agreed to have the services of an expert consultant who was to be consulted from time to time in the event any necessity arose for seeking clarification with regard to the response submitted by any of the tenderers.

4. In response to the NIT dated 12.3.2006, the writ petitioners as a joint venture and the respondent No.5 claiming to be duly authorised by the manufacturer of the equipment required to be offered for supply, submitted their respective bids which were opened on 10.8.2006. The bids submitted after initial scrutiny were sent to the consultant i.e. one SMEC whose report, as available on record, would seem to indicate that both the bids submitted by the writ petitioners and the respondent No.5 were found to be technically responsive, though an opinion was expressed that there was need to obtain an extended guarantee from the respondent No.5 in view of the fact that the product offered was largely untried in the market. The matter, thereafter, went to the Technical Committee constituted by the Board whose opinion was adverse to the respondent No.5. Such an adverse opinion, shorn of technical details, proceeded on the basis that the product offered being untried and unknown in the market, the respondent No.5 had failed to meet the requirements imposed by the conditions contained in the bid document, particularly Clauses 7 and 8 of Section III of the bid document. On receipt of the aforesaid opinion of the Technical Committee, the matter was referred by the ASEB once again to the consultant with a specific query as to whether the equipment offered to be supplied by the respondent No.5 would make the bid responsive to Clauses 7 and 8 of Section III of the bid document. The affirmative answ

er of the consultant, particularly, that the earlier supply effected by the resp ondent No.5 with regard to the equipment known as PL 1790 can be taken into acco unt in determining the bidders' qualification under Clauses 7 and 8 of Section III was disagreed to by the Technical Committee which met once again in the mont h of December, 2006. The Committee took the view that as the equipment known as PL 1790 was stated by the consultant itself to be different from what was being offered i.e. Micon T 390, which product, at best, was related to the equipment k nown as PL5000, the bid offered by the respondent No.5 cannot be considered to b e technically responsive. That apart, the Committee took the view that the produ ct offered being new and the source of spares etc. being uncertain, the ASEB sho uld not be made an experimental ground by the intended supply. The matter, there after, was sent to the ADB as required, which body disagreed with the views of t he Technical Committee by holding that the premises for judging the responsivene ss of the bid/offer must necessarily be those as embodied in the bid document it self. The ADB, on the said premises, directed for opening of the financial bids which, accordingly, was done sometime in the month of April, 2007. Aggrieved by the aforesaid actions and as the financial bid offered by the petitioners was mu ch higher than what was offered by the respondent No.5, which fact reasonably af fected the prospects of the writ petitioners to the grant of the contract in que stion, the present proceeding has been initiated.

5. Before proceeding to notice the stand taken by the contesting pa rties in the present proceeding and consideration of any of the said contentions , it will be necessary to set out hereinafter the provisions of the relevant cla uses of the bidding document on which reliance has been placed by the learned co unsels for the contesting parties and arguments have been advanced.

Section I
Instructions to Bidders

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8.0 AMENDMENT OF BIDDING DOCUMENT

8.1 At any time prior to the deadline for submission of the Bids, the Purchaser may amend the Bidding Document by issuing addenda.

8.2 Any addendum issued shall be part of the Bidding Document and shall be communicated in writing to all who have obtained the Bidding Document directly from the Purchaser.

8.3 To give prospective Bidders reasonable time in which too take an addendum into account in preparing their Bids, the Purchaser may, at its discretion, extend the deadline for the submissiono f the Bids, pursuant to ITB Sub-Clause 24.2.

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l the terms, conditions, and specifications of the Bidding Document without mate rial deviation, resrvation, or omission. A material deviation, reservationl, or omission is one that:
(a) affects in any substantial way the scope, quality, or performance of the Goods and Related Services specified in the contract; or
(b) limits in any substantial way, inconsistent with the Bidding Document, t he Purchaser‘s rights or the Bidder‘s obligations under the Contract; or
(c) if rectified would unfairly affect the competitive position of other Bid ders presenting substantially responsive Technical Proposals.
30.3 If a Technical Proposal is not substantially responsive to the Bidding D ocument, it shall be rejected by the Purchaser and may not subsequently be made responsive by the Bidder by correction of the material deviation, reservation, o r omission.

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all parties shall be jointly and severally liable, and (II) nominating a Represe ntative who shall have the authority to conduct all business for and on behalf o f any and all the parties of the JV during the bidding process and, in the event the JV is awarded the Contract, during contract execution.

Section - III
EVALUATION AND QUALIFICATION CRITERIA

Procurement of Grid Communicaitons (PLCC) Equipment
For
Substations in Assam

3.0 TECHNICAL CRITERIA:
& & & &

. Wave Trrap
. Carrier Terminal.

8.2 In the event of Joint Venture/Consortium to meet the supply capacity cri teria, the collective supply experience of the JV/Consortium should meet the cri teria requirements as per clause 3.1 above.

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SECTION-VI

SCHEDULE OF SUPPLY
Procurement of Grid Communications (PLCC) Equipment
For
Substations in Assam

Chapter 1

List of Goods and Related Services

1.1 LIST OF MAIN EQUIPMENT :

Item No.	Description	Unit of Measurement	Quantity	Remarks
1.1(a)	& &.. & & &. & & & &.& & &..			
1.1(b)	& & &. & & & &.& &.. & & &..			
1.3(a)	Single Channel PLCC Terminal	Each	110	
1.3(b)	Twin Channel PLCC Terminal	Each	96	
1.4(a)	& & &.. & & & & & & & &.& & & & &.			

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3.1.3 & & & & & & & & & & & & & & & & & & & & & & & & & & & & & & & & & &..

3.1.4 Bidders shall take particular note shall be taken that the scope includes for incidental civil/ building modifications to facilitate installation of the supplied PLCC equipment and where necessary, modify/ expand and existing substations' Control, PLCC and/or battery rooms. Bidders are to carefully assess existing substations PLCC equipment arrangements/ layouts and satisfy themselves regarding the adequacy of existing space and any actual need of civil/ building modification to ensure satisfactory installation. It is believed that experienced contractors may well entirely obviate or minimize the need for any civil/ buildings modification.

3.1.5 Bidders shall note that in the above works to be executed under this Contract for an extension to or rehabilitation of existing parts of the Employer's electricity supply system and their interconnection within Assam. Where the Works under this Contract, interface with the works of others engaged by the Purchaser under the Assam Power Sector Development Project (APSDP), the Works shall be coordinated with those other works in progress, together with all reasonable cooperation in matters of site access where works are required to proceed in similar programme timing with other works.

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3.4.0 BIDDING

3.4.1 Each tender shall be accompanied by the following information with sufficient details to enable the Purchaser to make an appraisal of the quality and suitability of the material and equipment offered.

(a) Type Test Certificates.

i) Type test certificates of equipment of similar design from an internationally or Govt. of India recognised laboratory or certificates of type test carried out at own laboratory, if the testing laboratory, has ISO 9000 (or its equivalent) series certification or in presence of representative from Govt. institution or organisation. The Type test certificates should not be more than 5(five) years old. Type tests certificates are required for following equipments :

. Capacitive Voltage Transformer (CVT)
. Wave Trap
. Power Supply module of Carrier Terminal and Battery Charger.
. Coaxial Cable.

ii) Equipment which has never been tested for critical performance shall not be accepted .In such cases, a promise or agreement by a bidder to have the equipment tested after award of a contract is not acceptable.

iii) Test reports to be acceptable must be related directly to equipment offered. Test reports for a higher class of equipment are acceptable with a commitment to perform the type test free of charge on the particular equipment after the contract is awarded. Reports of critical tests conducted earlier than the date specified in the specifications will not be accepted.

iv) Type-test reports of the same or similar equipment manufactured by a licensor or associated companies are acceptable only if they are jointly and severally bound under the contract.

(b) Manufacturer's literature, brochures, catalogues etc.

(c) Programme of Works setting out proposed scheduling of manufacture; works testing/inspections, shipment/ transport to site and equipment installation, in

cluding related supporting tasks. This programme shall also include a clear statement of which equipment outages will be required to proceed with safe installation, particularly outdoor plant such as CVTs and associated Wave Traps and Line Coupling Units etc. This programme will form the basis of a contract programme to be submitted within 1 week of contract commencement for approval of the Purchaser and thereafter become the Contract Programme for the required delivery of all specified equipment and related services.

3.4.2 Bidder should note that failure to comply with the provision of this clause might be sufficient reason to reject the bid.

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3.8.0 TYPE TEST REPORTS

3.8.1 All Bids must be accompanied by the Type Test Certificates of equipments offered. Such type test certificates shall be acceptable only if:-

(a) Tests are conducted in an independent and well known testing laboratory, or

(b) Tests are conducted in manufacturer's own laboratory. In this case (i) the laboratory must have ISO 9000 (or its equivalent) series certification; and (ii) tests have been witnessed by technically qualified representatives of earlier clients or purchaser.

3.8.2 Test reports to be acceptable must be related directly to the equipment offered. Test reports for higher class of equipments are acceptable with commitment to perform the type tests free of any charge on the particular equipment(s) after the award of contract.

3.8.3 Type Test Reports older than five (5) years on the date of Technical bid opening shall not be accepted.

3.20.0 DEVIATION

3.20.1 Any Deviation from the specified condition may be sufficient reason for out right rejection of the offer.

6. Having noted the salient clauses contained in the different sections of the bid document and before proceeding to take note of the rival submissions emanating from the arguments advanced there is one issue which the Court deems it appropriate to deal with at this stage. A question has been raised with regard to the maintainability of the writ petition in the absence of the Asian Development Bank (ADB) as a party to the present proceeding. It is the contention of Mr V. Hansaria, learned counsel for the respondent No.5 and Mr BD Das, learned counsel for the respondent Board that the decision impugned in the writ petition i.e. to open the price bids of the tenderers on the basis that both the tenderers had qualified in the technical bid is that of the ADB. The learned counsel for the respondents by placing before the Court the relevant clauses of the loan agreement executed by and between the ADB, the Govt. of India and the Govt. of Assam as well as the guidelines for procurement of loan from the ADB have strenuously contended that in each and every stage of the process leading to the grant of contract, it is the decision of the ADB that is final and binding on the borrower. In such circumstances, the writ petition, in the absence of the ADB, is not maintainable in law. In support of the aforesaid contention, reliance has also been placed on a Division Bench judgment of this Court in the case of Tractor

& Farm Equipment Ltd. -vs- Secretary to the Govt. of Assam, Dept. of Agricultur e & Ors., reported in 2004 (1) GLT 117.

7. Opposing the aforesaid contention advanced on behalf of the resp ondents, Mr. P.K. Goswami, learned senior counsel for the petitioners has argued that the decision/ directive of the ADB to open the price bids of both the tend erers was agreed upon by the Chairman of the ASEB, as evident from the note shee ts contained in the file produced before the Court. According to Mr. Goswami, th e ADB while directing opening of the price bids of both the tenderers had taken the view that disqualification of the respondent No.5 as made by the Technical C ommittee was on the basis of conditions beyond those specified in the bid docume nt. The said view, according to Mr. Goswami, is not correct. Therefore, as a bor rower who would be ultimately responsible for return of the loan which, in turn, would depend on successful implementation of the project, it was always open fo r the ASEB to disagree with the ADB or at least to seek a reconsideration of its views in the light of the correct facts. The said course of action was not adop ted by the ASEB who, instead, agreed with the views expressed by the ADB and pro ceeded to open the price bids of both the tenderers. It is that decision of the ASEB which has been impugned in the present writ petition and, therefore, the wr it petition cannot be held to be not maintainable in law. Mr. Goswami has altern ately pointed out that if the Court deems it appropriate, orders may be passed f or impleadment of the ADB as a party respondent in the present proceeding for wh ich purpose, the respondent No.5 has already filed an appropriate application wh ich has been registered and numbered as M.C. No. 3482/2007.

8. In Tractor & Farm Equipment Ltd. (supra), a Division Bench of th is Court has held the World Bank which had granted a loan to facilitate procurem ent of tractors by the Agriculture Department of the State of Assam to be a nece ssary party in a challenge made to the award of contract. The writ petition rais ing such a challenge in the absence of the World Bank was held by the Division B ench to be not maintainable. The Division Bench, however, did not lay down any l aw that the question of maintainability must be decided at the first instance. I n fact, in the opening paragraph of its judgment, the Division Bench had clearly expressed the view that it is desirable that the question of maintainability sh ould be decided at the first instance.

9. The present writ petition wherein an interim order has been pass ed by the Court halting the process of the grant of the contract, requires immed iate disposal. This is because the contract for the supply of PLCC equipment is not only time bound but the supply of the said equipment is interlinked with oth er works getting operational. The desirability of deciding the maintainability o f a writ petition as an issue of first priority must be distinguished from any m andatory legal obligation to do so. In the present case, if the Court is to hold the ADB to be a necessary party the prayer for impleadment as made by the petit ioners in MC No. 3482/2007 has to be allowed. Impleading of the ADB as a party r espondent and disposal of the writ petition on merits thereafter is bound to tak e time. In such circumstances, the Court is of the view that an attempt should b e made to judge the intrinsic merit of the challenge made by the writ petitioner s on an assumption that the writ petition is otherwise maintainable in its prese nt form. If on such consideration, more than a strong prima facie case is disclo sed, the question of addition of further parties could be taken up at such later point of time.

10. To enable due and proper consideration of the writ petition in t he manner indicated above, the arguments advanced by the rival parties may be ta ken note of at this stage.

Mr. P.K. Goswami, learned senior counsel for the petitioners has basically offered a two fold argument in support of the challenge made in the w rit petition. The learned counsel contends that the tender submitted by the resp

ondent No.5 is invalid for want of the mandatory authorisation certificate of th e manufacturer. In the absence of the aforesaid mandatory document, there is no question, according to the learned counsel, of consideration of the respondent's bid as has been done. The respondent No.5 not being a manufacturer of the equip ment offered, according to the learned counsel, it must have been duly authorize d by the manufacturer of the said equipment. According to Mr. Goswami, the said document i.e. the manufacturer's authorization is dated 1.12.2006 (Annexure-1 to the affidavit-in-opposition dated 13.6.2007 filed by the respondent Board) i.e. it was issued after the date of opening of the bid on 10.8.2006. Mr. Goswami ha s further submitted that though the respondent Board in its rejoinder affidavit dated 25.6.2007 has clarified that there was an earlier authorization of the man ufacturer dated 24.7.2006 which was submitted by the respondent No.5 along with its tender, the materials on record do not satisfactorily explain as to why if t here was an authorization dated 24.7.2006 already submitted by the respondent No .5 along with its tender, there arose any necessity for the subsequent authoriza tion dated 1.12.2006. Mr. Goswami has further argued that the tender submitted b y the respondent No.5 along with the enclosures, as placed before the Court in o riginal would go to show that that while the documents submitted and received al ong with tender were duly initialed, the authorization letter dated 24.7.2006 as available along with the tender does not contain any such initial. The above fa cts, according to Mr. Goswami, are sufficient for the Court to draw an adverse i nference against the respondent No.5 and to the effect that as the respondent No .5 had not submitted the mandatory authorization certificate of the manufacturer along with its tender, the respondent Board was under an obligation to reject t he tender submitted by the said respondent in accordance with Clause 30 (2) and (3) contained in Section I of the bid document.

11. Mr. Goswami, learned counsel has further argued that the respond ent No.5 does not satisfy the experience criteria laid down under Clause 7 of Se ction III of the bid document. In this regard placing Clause 7 in its entirety, Mr. Goswami has submitted that no material has been laid by the respondent No.5, as required, along with the tender submitted, to show that the equipment offere d has been in successful operation for at least five years preceding the date of opening of the bids as required under Clause 7.1.(ii) of the bid document. Simi larly, according to Mr. Gowami, the respondent No.5 had clearly failed to show t hat it had supplied the equipment offered, equal to the quantity of the equipmen t involved in the present package/ bid at any time during any two years in the p receding five years. The aforesaid argument of Mr. Goswami is sought to be built on the basis that what has been offered in the present package by the responden t No.5 is a carrier terminal known in the market as Micon T 390 which has been i ntroduced in the year 2006. Admittedly, the said equipment having come into the market only in the year 2006 and the respondent No.5 not having supplied the sam e at any earlier point of time, the requirement stipulated by Clause 7.1.(ii) an d Clause 8.1 have not been met by the respondent No.5. Mr. Goswami has further argued that even if the equipment offered i.e. T 390 can be understood to have a n acceptable connection with the earlier version of the equipment which was know n in the market as P.L. 5000, admittedly, the respondent No.5 had supplied only 98 numbers of the said equipment i.e. PLC 5000 whereas the requisite number of c arrier terminals that is proposed to be acquired under the present package is 21 2. Even on that basis, according to Mr. Goswami, the respondent No.5 has failed to meet the mandatory requirements spelt out by Clauses 7 and 8 of Section III of the bid document which obliged the respondent Board to reject the tender of t he respondent No.5 at the threshold.

12. The arguments offered by Mr Goswami have met with stiff resistan ce at the hands of the respondent Board as well as the respondent No.5. Mr. Das and Mr Hansaria, learned counsels representing the aforesaid respondents have ve hemently contended that even in the case of the writ petitioners in the initial report of the consultant- SMEC, a view was taken that the bid document submitted by the petitioners do not satisfy the requirement of joint and several liabilit

y of the parties in the event the tenderer is a joint venture. According to the learned counsels for the respondents, the declaration of such joint and several liability of the two parties to the joint venture i.e. the petitioner Nos. 1 and 2 were obtained subsequently, though, according to Mr. Goswami, such a course of action was permissible under Clause 29 of Section I of the bid document which permits a purchaser to obtain appropriate clarification with regard to a bid submitted. Mr. Hansaria has argued that in any event the bid submitted by the petitioners not having conformed to the laid down requirements at the first instance, it is not really open for the petitioners to contend that the bid submitted by the respondent No.5 was not technically responsive when subsequent clarifications (details of which will be noted later) had demonstrated that the bid submitted by the respondent No.5 was in conformity with all the conditions of the bid document, particularly Clause 7 and 8 contained in Section III.

13. The learned counsels for the respondents have also contended that the manufacturer's authorization certificate as required, was submitted by the respondent No.5 along with the tender. The certificate is dated 24.7.2006. The subsequent certificate dated 1.12.2006, in so far the PLCC Carrier equipment is concerned, was not really necessary. However, it was submitted by the respondent No.5 by way of abundant caution in view of certain queries raised by the respondent Board in its attempt to clarify some aspects of the bid submitted by the respondent No.5. The learned counsels have further pointed out that instead of placing the facts in the proper sequence, the Board, due to inadvertence, had placed the relevant facts with regard to submission of manufacturer's authorization by the respondent No.5 in a wrong chronological order leading to some confusion. However, properly construed, the facts revealed by the records in original make it abundantly clear that the requisite manufacturer's authorization was submitted by the respondent No.5 along with its tender and the said document is dated 24.7.2006. The learned counsels further stated that no specific issue raising a dispute with regard to the authenticity of the authorization certificate dated 24.7.2006 and the submission of the same along with the tender of the respondent No.5 has been raised by the writ petitioners warranting the Court to frame an issue on the said score and to go into the same in the present proceeding.

14. The learned counsels for the respondents have further argued that Clauses 7 and 8 of Section III of the bid document, or for that matter, any other Clause of the bid document do not impose any requirement that satisfactory operation of the equipment and machinery or supply of such equipment/machinery to the extent of the quantity required under the present package has necessarily to be in respect of equipment and machinery identical to what has been offered by a tenderer. The learned counsels have argued that the PLCC equipments undergo a process of constant upgrading requiring a change of the technology involved which is a continuous process. In such circumstances, there is no reason as to why a manufacturer or his nominee should be deprived of participating in the bid merely because the product that was earlier being manufactured or marketed had undergone some transformation in view of the more advanced technology available. Therefore, according to the learned counsels, successful operation of the earlier machinery manufactured or supplied as well as the quantity thereof to the extent contemplated by the clauses of the bid document is capable of being taken into account to determine the suitability of the machinery offered for supply. The learned counsels have argued that it would be unreasonable to accept that the bid document contains any clause which inhibits the purchaser from satisfying itself, on the basis of the test reports, as to the suitability of more technologically advanced items of machinery that may be offered by a tenderer. Such a meaning to any of the clauses of the bid document, according to the learned counsels, would be self defeating. The learned counsels for the respondents have also submitted that in some clauses of the bid document there is a reference to the product offered whereas in some other clauses there is a mere reference to the PLCC equipment required to be supplied. According to the learned counsels, in Clauses 7 and 8 of Section III of the bid document, reference is to PLCC Terminals that are

required to be supplied without any specific reference to any particular make or model.

15. Before proceeding to consider the rival submissions advanced, the core of which have been noticed above, it may be apposite and convenient for the Court to notice in some details the facts and events leading to the eventual decision to open the price bids of both the tenderers that have been revealed by the records in original as placed before the Court.

16. After the technical bids of the two tenderers i.e. the petitioner Nos. 1 and 2 on the one hand and the respondent No.5 on the other were opened on 10.8.2006, letters dated 5.9.2006 were addressed to both the tenders seeking certain clarifications with regard to the bids submitted by them. In so far as the respondent No.5 is concerned, such clarifications sought, inter alia, were in respect of the number of carrier terminals supplied in the last two years as well as fulfillment of the criteria mentioned in Clause 7.1(ii) of Section III of the bid document, (mentioned as Section I in the letter dated 5.9.2006). In so far the petitioners are concerned, such clarifications, inter alia, were with regard to the liability of the lead partner (M/S NECCON) and also for providing the manufacturer's authorization certificate for ancillary items like telephone set and air cooler equipments. Thereafter, on 11.9.2006 a joint meeting was held by the authority of the respondent Board with both the tenderers. In the meantime, on 14.9.2006, SMEC, the appointed consultant, submitted its evaluation of the technical bids of both the tenderers, which document has been brought on record by the respondent Board as Annexure-4 to its additional affidavit dated 27.7.2007. The recommendation of the consultant is to the following effect :

We find the Joint Venture of M/S Eastern Cables and Conductors Ltd & ABB India Ltd technically qualified and could be progressed to the next stage of commercial evaluation.

We find M/S Areva T & D Systems India Ltd technically qualified. However, M/S Areva has offered their last evolution of the PLC5000 (version 2) which has been re-named as Micon T390. As this new evolution T390 is a new model in the market we suggest that we should negotiate with M/S Areva on an extended warranty. M/S Areva T & D could be progressed to the next stage of commercial evaluation.

This recommendation is made in accordance with the requirements specified in the Invitation to Bid. .

17. On 16.9.2006, the petitioners submitted the requisite clarifications in response to the Board's letter dated 5.9.2006 and confirmed the joint liability and responsibility of both the parties i.e. the petitioner No.1 and 2 in respect of the entire contract work. In so far the respondent No.5 is concerned, the said respondent responded in the matter by its letter dated 15.9.2006 which contained several enclosures. Thereafter, on 25.9.2006 a meeting of the Technical Committee constituted by the Board for evaluation of the technical bids submitted by the tenderers was held. In the said meeting while the Technical Committee found the bid of the petitioners to be responsive, the bid submitted by the respondent No.5 was found to have failed to qualify technically. Specifically, the Technical Committee was of the view that the respondent No.5 had failed to produce any evidence of supply of the new model (MICON T390) to any organization and further that the said respondent has no experience in installing and commissioning of PLCC links. In other words, the Technical Committee found the respondent No.5 to have failed to meet the requirements imposed by Clauses 7 and 8 of Section III of the bid document.

18. The opinion of the Technical Committee, it appears, was sent to the ADB for its approval on 11.10.2006. The ADB by a communication dated 2.11.2006 informed the Director (PMU), ASEB to the following effect :-

However, M/s AREVA claims that i) it has quoted for this turnkey project , which mainly includes PLCC terminals, Line matching unit and protection couple r manufactured by AREVA, France, CVT and Wave traps manufactured by AREVA India. The manufacturer's authorization for these items has been included in the bid; ii) it has submitted the supporting documents from manufactures which meet the s pecification requirement of the manufacturer having designed, manufactured; type tested, supplied and commissioned respective equipments and which are in succes sful operation for at least five years as on date of bid opening; and iii) all t he supporting documents for the supply capacity requirement are enclosed with th e bid.

We would appreciate your views on this matter. .

19. After receiving the response of the Chief Engineer, TNT, ASEB to the above letter of the ADB, the Board referred the matter to the consultant SM EC by its letter dated 17.11.2006. The consultant drafted a letter to be address ed by the Board to the respondent No.5 seeking certain clarifications. The said letter was issued by the Board on 22.11.2006. On receipt of the clarifications s ent by the respondent No.5 in response to the Board's letter dated 22.11.2006, t he matter was referred to the consultant once again for scrutiny with the follow ing specific request :-

You are requested to examine in details the specific features of PLCC Panels a s required by the Bid Document, and compare with that as submitted by M/s AREVA to bring out the similarities/ dissimilarities between PLC5000 and MICON T390 of AREVA, France make. Kindly intimate us about the conclusions arrived at on the basis of reply from M/s AREVA.

I may add that the conclusions are to be conveyed to ADB at the earliest ; therefore I would like to request you kindly to expedite the matter. .

The SMEC sent its views in the mater on 12.12.2006 with the foll owing opinion :-

After detailed review of the two catalogues and technical comparison the follow ing conclusions can be drawn.
The Micon T390 units have clearly evolved from the PLC 5000 units, but with some more advanced features and capabilities included.
The two catalogues are almost identical with the name PLC 5000 just being change d to Micon T390 in most cases.
The capability of combining both these products into a 'mixed system' clearly in dicates that the two PLC's are of the same product family, and that the Micon T3 90 system was developed specifically with that capability in mind.
We trust the above clarification is to your satisfaction. .

20. On receipt of the consultant's views dated 12.12.2006, the ASEB on 18.12.2006 wrote another letter to the consultant specifically requesting for its opinion as to whether the respondent No.5 fulfilled the criteria laid down in Clause 7.1(ii) and Clause 8.1 of Section III of the bid document. For clarity the specific query of the Board as contained in the communication dated 18.12.2 006 may be extracted below:-

It is now understood that the MICON T390 is an evolution of the earlier PLC5000 panels. It appears that the PLC 5000 PLCC panels have been supplied since 2003(as intimated by M/s AREVA vide their clarification letter No. ET 060082/1675 dtd 01.12.2006). As per the Bid Document Clause 7.1.(ii), Instruction to Bidders, t he equipment offered has to be in successful operation for at least 5(five) year s. Our request in this regard is : please confirm whether M/s AREVA qualifies un

der this Clause.

Further, as per Clause 8.1, Instruction to Bidders, the number of units supplied in any two years (best years) out of the last 5(five) years, should be more than the tendered quantity. The reference list submitted by M/s AREVA lists only 98 nos of PLC 5000 panel supplied during 2004 and 2005.

Kindly made it convenient to confirm whether M/s AREVA can be qualified under the aforementioned Clauses. .

21. Thereafter, on 26.12.2006, the consultant, SMEC, informed the Board that in its opinion, the respondent No.5 fulfills the criteria spelt out by Clause 7.1(i) and Clause 8.1 of Section III of the bid document. The views of the consultant for clarity may be extracted below:-

Clause 7.1(ii) :- M/S AREVA started manufacturing PLCC 5000 in 2003 and they have supplied analog version since 1994. Thus they fulfill the supply requirement as required under this clause.

Clause 8.1 :- Number of PLC panels (PLC 5000) supplied during the year 2004 and 2006 is only 98. However, in the clarification letter of M/S AREVA, ET 060082/1570 dated 13th September, 2006 (letter enclosed for your reference) they have identified that they have supplied 315 Nos. PLC 1790 analog Carrier Terminals from 2005 to 2006, thus meeting the supply requirements.

The PLC 1790 is an analog system different to the PLC5000/T390 digital/ analog system that has been offered. As this clause does not specifically require that the units supplied during any 2 years in the last 5 years have to be the same products as offered, it is difficult to discount PLC 1790 units from the supplied quantities.

If you require further assistance on this matter, please do not hesitate to contact us. .

22. Thereafter, it appears that on 29.12.2006 the Technical Committee of the Board once again deliberated in the matter and on consideration of the subsequent facts and events including the opinion of the ADB and the consultant-SMEC as noted above, the Technical Committee reiterated its earlier view holding the bid submitted by the respondent No.5 to be technically not responsive. The matter having been sent to the ADB once again, the ADB on 28.3.2007 informed the Board that based on the requirements of the bid document, the bid submitted by the respondent No.5 cannot be considered to be technically not responsive. The ADB on the said basis recommended that the price bids of both the tenderers should be opened. The said view of the ADB having been concurred by the Chairman of the Board as evident from the records in original placed before the Court, the price bids of both the tenderers were opened on 3.4.2007 immediately whereafter, this writ petition has been filed.

23. The first issue arising for determination in the present case ne ed not detain the Court. Whether the authorisation certificate dated 24.7.2006 w as submitted by the respondent No.5 along with its tender and, therefore, was av ailable on record at the time of opening of the bids on 10.8.2006 or whether the same was not a part of the tender papers submitted by the said respondent and f urther whether the authorisation certificate dated 1.12.2006 was the only author isation certificate submitted by the respondent No.5 and, hence, the same was so submitted after the bids were opened, are hotly contested issues that would req uire the Court to determine what would be essentially questions of fact. Such an exercise, the Writ Court, normally, will not go into for reasons that would har dly require any reiteration. However, if a resolution of the said question is po ssible on the face of the materials available, it will be permissible for the Wr it Court to undertake such an exercise. In the present case, the authorisation c ertificate dated 24.7.2006 has been placed before the Court by the respondent Bo ard as a part and parcel of the tender submitted by the respondent No.5. There i s no reason why the respondent Board should be dis-believed and the stand taken at the hearing should be discarded only because of the obvious mix up in the nar ration contained in the affidavits dated 13.6.2007 and 25.6.2007 filed by the Bo ard. When the records in original placed before the Court by an instrumentality of the State like the ASEB clearly indicate that the authorisation certificate dated 24.7.2006 was filed by the respondent No.5 along with its tender, merely b ecause the subsequent authorisation dated 1.12.2006 was also filed and the respo ndent Board, for reasons of inadvertence, had laid stress on the same in its aff idavit dated 13.6.2007, the Court ought not to jump to the conclusion that the a uthorisation certificate dated 24.7.2006 was not filed along with the tender of the respondent No.5 and what was submitted is the authorisation dated 1.12.2006. Any such conclusion will be hasty and abrupt and, therefore, must be avoided. T hat apart, the communication dated 2.11.2006 of the ADB, the contents of which h ave been noted above, specifically mentions about the authorisation certificate of the respondent No.5. Having regard to the date of the said communication i.e. 2.11.2006, it must be held that the authorisation certificate dated 24.7.2006 w as filed by the respondent No.5 along with its tender and the failure of the res pondent Board to highlight the said fact in its affidavit dated 13.6.2007 was a lacuna/shortcoming, which fact by itself, will not be decisive of the matter.

24. This will bring the Court to a consideration of the second and t he main issue in the case. What is the true meaning and effect of Clauses 7 and 8 of Section III of the bid document ? Is the qualification of the manufacturer and successful operation of the machinery, as contemplated by Clause 7, in respe ct of the machinery identical to what is being offered for supply ? Does the req uirement of the quantity of supplies earlier made by a tenderer, as stipulated b y Clause 8, has to be in respect of machinery identical to what is being offered in the present package ? These are the moot questions that will have to be answ ered by the Court.

25. Mr. Goswami, learned counsel for the petitioners has emphasized that a pragmatic view, consistent with what a reasonable purchaser would expect, must be taken by the Court. According to Mr Goswami, a purchaser cannot be expe cted to derive satisfaction as to the suitability and credibility of the machine ry offered by a tenderer on the basis of the experience of the manufacturer and the performance in respect of some antiquated and outdated machinery and equipme nt. A buyer must know the antecedents and the performance of the machinery that is being offered so as to be in a position to make a fair assessment of the suit ability of the machinery offered to its needs and requirements. There is, theref ore, an inbuilt requirement in Clauses 7 and 8 that the qualification of the man ufacturer, successful operation of the machinery and the volume of supply earlie r made must be in respect of the machinery that is being offered by a tenderer. Micon 390 that was offered by the respondent No.5 is unknown and untried in the

market. Even if an acceptable linkage of the said machinery with its claimed ear lier version i.e. PLC 5000 is assumed, the respondent No.5 had supplied only 98 Nos. of the said machine i.e. PLC 5000. In such circumstances, according to Mr. Goswami, the failure of the respondent No.5 to conform to the requirements of Cl auses 7 and 8 is apparent, thereby warranting rejection of the bid submitted by the said respondent.

26. The PLCC equipment required to be supplied under the NIT dated 1 2.3.2006 is basically a telecommunication equipment. Technological advancement i n such equipment is a continuous process. Incorporation of the advanced features in such equipment and renaming of the product is an ongoing effort of every man ufacturer. Offer of such advanced versions of the machine at competitive prices is the constant endeavour of a manufacturer/ supplier in order to gain a busines s advantage over his rivals. The requirements spelt out by the bid document make it obligatory for the manufacturer or supplier, as the case may be, to establis h the potential advantages of the machinery offered by enclosing the requisite l iterature. That apart, test reports of the machinery offered, which tests are to be carried out only in approved laboratories and centres is another requirement imposed by the bid document. The list of equipments required to be supplied, as contained in Chapter 1 of Section VI of the bid document specifies the items re quired to be supplied without any reference to the make or model or any specific features. The manufacturer’s authorisation and type test as required by ITB Cla use 11.4.(i) of Section II does not mention anything about the performance or ex perience certificate of the machinery offered for supply. Clause 3.1.2 of the Te chnical Specification contained in Chapter 3 of Section VI requires a bidder to make an assessment of the suitability and adaptability of the equipment intended to be supplied for rehabilitation and expansion of the existing PLCC System in the ASEB. Clause 3.8 of Chapter 3 of Section VI requires a bid to be accompanied by Type Test Certificates of the equipment offered.

27. All the above clauses of the bid document would strongly suggest that the ASEB, while issuing the bid document, had not intended to impose any i nhibition or restriction in its consideration of the equipment offered, much les s by reference to only what had been earlier commissioned or supplied by a tende rer. Any such view would be a retrograde step in the process of acquisition of m ore advanced versions of the machinery required and, therefore, must be avoided unless clearly spelt out in the bid document. On the other hand the contrary vie w would leave the Board with the option of assessing the suitability of a new/ad vanced product on the basis of the literature made available and the test report s required to be submitted. In such a situation, why should a meaning be given t o Clauses 7 and 8 of Section III, as sought by the petitioner, which would depri ve the Board from even considering the suitability of what is being claimed by a manufacturer or supplier to be a technically more advanced item of machinery. I n the absence of any expressed clause/condition to the effect that the machinery offered must be identical to what was earlier commissioned and supplied, the be tter and more reasonable view would be to ascribe to the relevant clauses of the bid document a meaning which would permit and facilitate such consideration by the Board with, of course, the option to reject a product offered on the ground of its inadequacy or unsuitability. Viewed thus, the meaning that the petitioner s would like the Court to ascribe to Clauses 7 and 8 does not appear to be sound . Clause 7.1.(ii) of Section III of the bid document cannot, therefore, be held to require a manufacturer/ supplier to have to its credit a record of successful operation (for five years) of the very item of the machinery/ equipment that ha s been offered in the tender submitted. Neither can Clause 8 be understood to ha ve laid down any requirement of previous supply of machinery identical to what i s being offered by a bidder in the present package.

28. In the present case there is no dispute that PLC 1790 earlier su pplied by the respondent No.5 is also a carrier terminal and that the said respo ndent had supplied 315 Nos. of PLC 1790 and 98 Nos. of PLC 5000 during the years

2004 to 2006. The said number exceeds the volume of supplies required to be made under the present package. In view of the conclusions reached, the Court must hold that the respondents were correct in coming to the conclusion that the respondent No.5 was technically qualified and, therefore, entitled to have its price bid opened for due consideration. The above conclusion of the respondents having been reached and recorded after an elaborate and detailed consideration of the matter, as evident from the sequence of events already narrated, the Court will have no occasion to take an adverse view of the decision making process either.

29. The foregoing discussion and the conclusions reached lead the Court to the ultimate conclusion that the present writ petition has to be held to be without any merit or substance. It is, accordingly, dismissed, however, without imposing any cost.

30. The interim order/ direction passed earlier is vacated. The respondents will now be at liberty to proceed further in the matter, but strictly in accordance with law.